

1 Ramon Rossi Lopez - rlopez@lopezmchugh.com
2 (California Bar Number 86361; admitted *pro hac vice*)
3 Lopez McHugh LLP
4 100 Bayview Circle, Suite 5600
5 Newport Beach, California 92660
6 949-812-5771

7 Mark S. O'Connor (011029)
8 mark.oconnor@beusgilbert.com
9 Beus Gilbert PLLC
10 701 North 44th St.
11 Phoenix, Arizona 85008
12 480-429-3000

13 *Co-Lead/Liaison Counsel for Plaintiffs*

14
15 UNITED STATES DISTRICT COURT
16 FOR THE DISTRICT OF ARIZONA

17 In Re Bard IVC Filters Products
18 Liability Litigation

19 No. MD-15-02641-PHX-DGC

20 This Document Relates to:

21 Debra Tinlin, et al. v.
22 C. R. Bard, Inc., et al.
23 CV-16-00263-PHX-DGC

24 **PLAINTIFFS' RESPONSE IN
25 OPPOSITION TO DEFENDANTS'
26 MOTION IN LIMINE NO. 3 TO
27 EXCLUDE EVIDENCE OF THE CRISIS
28 COMMUNICATIONS PLAN**

1 In 2004, Bard retained the public relations firm, Hill & Knowlton (“H&K”), to
 2 prepare a “Crisis Communication Plan” to implement “an immediate communications
 3 strategy” to address bad press resulting from the internal investigation of a death related
 4 to the Recovery filter “and others that may arise.” *See Doc. 16573-1*, at 2. It was
 5 “intended to prepare for … product withdrawal and or [sic] general negative stories
 6 surround Recovery Vena Cava Filters.” Doc. 16573-1, at 3. H&K and Bard together
 7 created additional documents attached to the Plan’s Appendix, containing information
 8 about Bard’s Recovery filter.¹ Numerous Bard employees/consultants reviewed, updated,
 9 and commented on the Crisis Communication Plan as it went through Bard’s corporate
 10 review process.² Bard now seeks to exclude all related evidence. The motion should be
 11 denied as the evidence is relevant and not unduly prejudicial.

ARGUMENT AND CITATION OF AUTHORITIES

13 First, The Crisis Communication Plan is relevant because it outlines Bard’s
 14 knowledge of the Recovery filter’s known risks and Bard’s attempt to downplay those
 15 risks and associated injuries related to the Recovery filter at the outset of marketing. Bard
 16 nevertheless argues the Crisis Communication Plan was a response to a “cephalad
 17 migration” not “substantially similar” to Mrs. Tinlin’s injury. Def. Mtn at 2. This is not a
 18 complete description. This document was intended to prepare for “general negative
 19 stories surrounding Recovery Vena Filters.” Doc. 16573-1, at 3. The Crisis
 20 Communication Plan itself is not “evidence of other accidents” used as “direct proof of
 21 negligence, a design defect, or notice of the defect.” *See Cooper v. Firestone & Rubber*
 22 *Co., 945 F.2d 1103, 1105 (9th Cir. 1991)*. Moreover, even if it were, this Court
 23 previously held that case law such as *Cooper* is not controlling over alleged substantial
 24

25 ¹ See Exhibit A, April 13, 2004 Glass email. Also, key messages used in interviews and
 26 “distributed to BPV’s sales force, customers, physicians, employees, suppliers and others
 27 as needed.” Doc. 16573-1, at 5. Q&As were used to “respond to questions from external
 28 audiences” and hand “out to media, customers, physicians, suppliers, investors and other
 Bard audiences.” Exhibit B, April 13, 2004 External Q&A at 1.

² Included were the head of marketing and the head of global sales. Exhibit C, May 4,
 2004 Hudnall email.

similar incidents when, *inter alia*, the evidence Plaintiffs seek to introduce does not involve an unrelated product failure. *See*, Doc. 10258, at 4³. In fact, fractures are the exact negative scenarios described in the plan itself associated with the Recovery filter; Bard admitted Recovery fractures were a reason for development of its G2 filter⁴. The Crisis Communication Plan is relevant as it identifies an initial reported failure mode associated with the same product, anticipation of future failures, Bard's testing of the product, and a gestalt of behavioral reactions as "new details arise in this or other incidents." If the "substantial similarity" test were to be applied, it can easily be met. *See Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1083 (5th Cir. 1986). The "substantial similarity" rule is not so rigid as to exclude evidence of similar injuries involving the same device. *See Walton v. Bridgestone/Firestone, Inc.*, 2009 WL 2778441, at *7 (D. Ariz. Jan. 16, 2009). Even adopting Bard's narrow scope of "similarity", the evidence Bard seeks to exclude discusses strut migration,⁵ which Mrs. Tinlin experienced—including struts migrating to her heart and lungs. For this reason alone, this evidence is relevant.

The Crisis Communication Plan and related evidence also supports Plaintiffs' punitive damages claim as it is reflective of Bard's deliberate course of conduct in reacting to its knowledge of the product's burgeoning failure history.⁶ The frame of mind of the alleged wrongdoer is a necessary consideration in determining whether punitive damages may be imposed." *Sharp ex rel. Gordon v. Case Corp.*, 595 N.W.2d 380, 390 (Wis. 1999). Punitive damages require looking "to the frame of mind of the wrongdoer."

³ Similar to this Court's ruling in Booker, Plaintiff's experts opine that she also suffers from multiple failure modes: tilt, migration, and fracture with migration and perforation.

⁴ "[O]ne of Bard's goals in developing the G2 Filter was to reduce the number of incidents of filter fracture and migration that Bard had observed with the Recovery Filter." Doc. 9862 at 4.

⁵ *See, e.g.*, Exhibit D, Jan. 10, 2006 Crisis Communication Plan at 52 ("Other potential causes of filter migration include improper implantation technique and fracture or failure of the filter wires.").

⁶ Punitive damages are permitted when the "defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Wis. Stat. § 895.043. Bard's actions are not limited to the hiring of the firm, rather its conduct in developing the plan.

1 *Walter v. Cessna Aircraft Co.*, 358 N.W.2d 816, 819 (Wis. Ct. App. 1984). Here, the
 2 Crisis Communication Plan and related evidence shows Bard's knowledge of risks and
 3 frame of mind. Rather than take appropriate action, Bard publicly "downplayed" the
 4 problem's extent and the plan gives the background of the conduct.⁷ Such conduct
 5 exemplifies the deliberate acts a jury could interpret as malicious or with intentional
 6 disregard for potential harm. *See* Wis. Stat. § 895.043; Wis. JI-Civil 1707.2.

7 Bard also argues that because H&K helped create the Crisis Communication Plan,
 8 it "is not specific to Bard" and thus "lacks probative value." *See* Def. Mtn. at 3. This is
 9 incorrect. H&K created the template, Bard filled it with a core team to approve response
 10 strategy, draft/review specific messaging, and dispense messaging to the media, sales
 11 force, and public. Bard's team was actively involved in writing all content pertaining to
 12 the Recovery filter and despite its reliance on case law addressing public relations firms
 13 guiding corporate reaction, it has not shown that the Crisis Communication Plan is not
 14 relevant or could not be interpreted by a jury as malicious or intentional conduct. Bard's
 15 arguments appear to be ripe for cross examination rather than exclusion based on Rules
 16 410, 402, and 403.

17 Also, Bard relies on a tenuous presentation of testimony from Holly Glass to
 18 suggest it would suffer "unfair prejudice" because the Crisis Communication Plan was
 19 "not finalized" or "never implemented."⁸ Ms. Glass never suggested the Crisis
 20 Communication Plan was never used, was unaware of later versions,⁹ and could not say
 21 which version Bard ultimately approved.¹⁰ The extent the Crisis Communication Plan

22 ⁷ *See, e.g.*, Exhibit E, Apr. 15, 2004 Lehmann email.

23 ⁸ *See* Def. Mtn. at 2-3 n.4. Ms. Glass only testified that the October 2004 version of the
 24 Crisis Communication Plan "was never implemented" because she remembered there
 25 was a later version of the plan. *See* Doc. 16573-3 at 9-10 (Deposition of Holly Glass at
 26 169:18-170:6).

27 ⁹ When asked about versions from late 2005 and early 2006, Ms. Glass responded, "I
 28 haven't seen those" and stated she thought the dates were wrong because she did not
 29 "remember this going on for years." Doc. 16573-3 at 10-11(Deposition of Holly Glass at
 30 170:21-171:11).

31 ¹⁰ When asked whether she had an independent recollection of whether the Plan was
 32 approved and appears in Bard's corporate files, she responded "No."
 33 Doc. 16573-3 at 13-14 (Deposition of Holly Glass at 173:24-174:7).

1 was “implemented” to the public is immaterial to its admissibility. It was formally
2 approved reflecting Bard’s corporate process and conduct. Ultimately, it was so
3 important to Bard’s strategy that Bard continued to amend it for two years¹¹—long after
4 Bard had stopped selling the Recovery filter. Bard also suggests that Plaintiffs would
5 attempt to “sneak in” evidence of other incidents. For reasons stated above, this is not the
6 case. Such evidence is admissible and Bard’s Motion to exclude the Crisis
7 Communication Plan should be denied.

8

9 RESPECTFULLY SUBMITTED this 12th day of April 2019.

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11 BEUS GILBERT PLLC

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13 By:s/ Mark S. O'Connor

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Mark S. O'Connor
701 North 44th St.
Phoenix, Arizona 85008

15

16 LOPEZ McHUGH LLP

17

Ramon Rossi Lopez (CA Bar No. 86361)
(admitted pro hac vice)
100 Bayview Circle, Suite 5600
Newport Beach, California 92660

18

Co-Lead/Liaison Counsel for Plaintiffs

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28 ¹¹ Bard employees continued to use and revise the Crisis Communication Plan at least through January 2006. See, Exhibit D., Jan. 10, 2006 Crisis Communication Plan.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 12th day of April 2019, I electronically transmitted the
3 attached document to the Clerk's Office using the CM/ECF System for filing and
4 transmittal of a Notice of Electronic Filing.

5 _____
6 */s/ Jessica Gallentine*
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